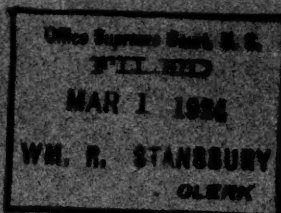


No. 456.



In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA AND INTERSTATE
COMMERCE COMMISSION, APPELLANTS,

v.

ABILENE & SOUTHERN RAILWAY COMPANY, THE
ATCHISON, TOPEKA & SANTA FE RAILWAY COM-
PANY, ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF KANSAS.

MEMORANDUM REPLY BRIEF FOR THE INTERSTATE
COMMERCE COMMISSION.

J. CARTER FORT,

For the Interstate Commerce Commission.

P. J. FARRELL,
Of Counsel.

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way Company, et al., appellees.

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*APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF KANSAS.*

MEMORANDUM REPLY BRIEF FOR THE INTERSTATE COMMERCE COMMISSION.

This case was fully argued in our original brief and in the briefs for the United States and the Orient Railroad. We do not propose to repeat here what has been said already. But it seems desirable to comment upon certain statements in the "Brief for Appellees."

Page 2:

It is said that—

While one arm of the Government was thus cutting the income of the Orient and its con-

nections, the appellees, another governmental body, the United States Railroad Labor Board, had caused an advance of wages aggregating to the Orient (Com. 272) the burdensome amount of \$325,000 per annum.

The record reference shows merely that the Orient had petitioned the Labor Board for permission to reduce its wages, and that if its petition were granted the Orient would save approximately \$325,000 per annum.

Pages 2 and 3:

In an effort to show "what kind of a railroad the Orient has been from the beginning," counsel state—

It was shown (Com. 312) by Exhibit 22 that from 1905 down to 1920 the Orient had failed to earn operating expenses in every year except 1903, 1904, 1907, and 1913.

Exhibit 22 shows such operating deficits as follows:

1905.....	\$5, 570. 00	1914.....	\$28, 516. 60
1906.....	3, 119. 69	1915.....	273, 513. 83
1908.....	104, 324. 26	1916.....	468, 952. 00
1909.....	192, 303. 49	1917.....	580, 144. 00
1910.....	61, 514. 79	1918.....	695, 246. 00
1911.....	145, 117. 78	1919.....	1, 223, 369. 00
1912.....	334, 095. 03	1920.....	1, 461, 279. 00

The figures thus shown as "operating deficits" in appellees' brief are not the operating deficits and are not so shown in Exhibit 22. These figures represent deficits after "deductions from income." The Exhibit does not show what constituted the "deductions from income," but there can be no doubt that among

other things interest was included. Instead of showing operating deficits for every year except 1903, 1904, 1907, and 1913, Exhibit 22 shows that the railway operating revenues exceeded the railway operating expenses for every year prior to Federal control, except 1909¹⁹¹² and 1914.

Exhibit 22 was introduced in evidence by counsel for appellees during the cross-examination of a witness on behalf of the Orient. The exhibit has many infirmities. The figures covering the years 1905 to 1912 include not only the operations of the Orient line in the United States, which is the carrier in which we are interested, but also the operations of the so-called Orient lines in Mexico, which are in no way affected by the Commission's order. Furthermore, the figures for the year 1914 cover the operations only of the Orient lines in Oklahoma and Kansas instead of the operations of the Orient System in the United States. Still further, the Orient lines in the United States were not completed from Wichita to Alpine until 1913, and therefore the operating results prior to that time are of little significance.

The operating income of the Orient System in the United States for the years 1912 to 1921, inclusive, is shown in the Commission's report. (Rec. p. 12.) During that period and prior to Federal control there was an operating deficit, after taxes, for only three years 1912, 1914, and 1917; for the three-year period 1915, 1916, and 1917 there was an operating profit.

There were large deficits for the years 1918, 1919, 1920, 1921. During Federal control, beginning January 1, 1918, and extending to March 1, 1920, very abnormal conditions affecting transportation prevailed all over the United States. Costs were extraordinarily high, and as a matter of policy the Government did not attempt to make rates correspondingly high. The result was that railroad operation generally by the Government was very unfavorable from a financial point of view. So far as the Orient companies are concerned, however, they were not affected by these losses during the period of Government operation. Under the provisions of the Federal control act the companies whose properties were taken over received compensation from the Government, based, generally speaking, upon the result of their operations during the test period; that is, the three-year period ending June 30, 1917. For six months after the termination of Federal control—that is, until September 1, 1920—rates were not raised to meet the new conditions. In view of this fact, the Government guaranteed a return to the railroads during this period on the basis of the compensation which they had received during Federal control. Therefore the operations for 1920, as well as the operations for 1918 and 1919, are not to be regarded as in any way significant.

From what we have said it appears that the history of operating deficits as set forth in appellees' brief is based upon erroneous figures and is entirely without significance.

Page 3:

The testimony of Mr. Shaufler, Traffic Manager of the Orient, is quoted, in part, as follows:

If the property was to continue there [from Wichita to Alpine] as it is now, it would be impossible to make operating expenses.

Mr. Shaufler could have meant only that under then existing rates and divisions (and it should be remembered that 84 per cent of the freight revenue of the Orient arises from divisions) it would be impossible for the Orient to earn operating expenses. The quotation in appellees' brief is from page 187 of the record before the Commission.

On page 186 the following appears:

Mr. Wood. Q. In your opinion, Mr. Shaufler, as an experienced traffic man, familiar with this property, will it ever be able to maintain itself and pay a return to the owners until it is put through according to the original program to the Pacific coast?

A. I believe that the property will pay operating expenses, and, I might say, at least operating expenses when it is completed to Kansas City.

Q. You mean even under the present basis of divisions it would pay operating expenses if completed to Kansas City?

A. It would put the Orient Railroad in position to get its full share of transcontinental traffic or traffic to and from territory where it would be in position to handle.

Q. That is to say, if your line were completed through to Kansas City, in your judgment you

would not be here asking a readjustment of divisions in order to make operating expenses.

A. That is my personal opinion. [*Italics ours.*]

The fact that the Orient did actually earn its operating expenses, after taxes, for the three-year period prior to Federal control, seems to be a complete answer to any suggestion that, under reasonable conditions it could not be expected to earn operating expenses.

Page 4:

It is stated that an estimated deficit for the Orient of \$1,315,000 "is almost as much as the gross revenue of the Orient for any year of its history as shown (Com. 312) in its exhibit 22." Exhibit 22 was not an exhibit of the Orient, but was introduced by appellees.

This Exhibit, however, shows the railway operating revenue of the Orient for 1920 as \$3,716,397; 1919, \$2,834,050; 1918, \$2,448,332; 1917, \$2,526,123; 1916, \$2,599,332. In addition, Exhibit 1 (Record before the Com., p. 264), shows that in 1921 the operating revenues of the Orient were \$3,988,998.25, or substantially \$4,000,000.

Page 4:

It is said, apparently to show that the Orient is not an important or necessary railroad, that—

The line was built (Com. 100) into a cattle country. It was built into a country (Com. 101) where "on several occasions in Texas all of the cattle would have perished and died on account of drought."

The sentence of the witness which is quoted in part in appellee's brief reads in its entirety:

I might also say that if it had not been for the Orient Railroad, on several occasions in Texas all of the cattle would have perished and died on account of drought.

The complete testimony of the witness in this connection is as follows:

The territory between Wichita and San Angelo, Texas, to-day is used for the purpose of raising grain, hay, cotton, and farm products.

The territory between San Angelo and Alpine is still given over to the raising of livestock. The land in that territory before the Orient was completed or built in that territory was worth from 50 cents to a dollar an acre. To-day the values are greater, and we will give them later.

I might say, however, that when the Orient started to handle livestock from Texas and Oklahoma, they were of a different class than you find to-day. They were mostly horns and bones. To-day they are a fine-breed variety. Some of the finest cattle raised in this country to-day are raised in Texas, tributary to the Orient Railroad.

I might also say that if it had not been for the Orient Railroad on several occasions in Texas all of the cattle would have perished and died on account of drought.

Mr. WOOD. (Q.) All the cattle in the State of Texas?

A. Tributary to the Orient Railroad.

Page 5:

Appellees say that—

The Orient is so paralleled that if the Commission were to attempt to relieve it by giving it specially high rates the shippers would drive their cattle or haul their products to competing lines.

That refutes the statement of the Commission (Trans. 14) drawn from a record other than this, that the Orient "is of essential importance in meeting the transportation needs of the public within the territory which it serves."

_____ The record does show that the Orient, like any other line of railroad, would lose a portion but "not the greater amount" (Rec. before the Com., p. 160) of its traffic to competing lines if its rates were higher than those of competing lines. There are points where the Orient is crossed by other lines, and there are parts of its line which compete with other lines for a certain amount of business. As we have suggested, this is not a condition in any way peculiar to the Orient, but a condition which prevails on every line of railroad.

The map which is appended to the Commission's original brief shows that for long stretches in Texas there is no other railroad within 40, 50, or 60 miles of the line of the Orient. The record shows that the Orient lines "now carry higher rates on cattle

than our [its] connections or the railroads operating in Texas, * * * ." We do not mean to reargue here the question of the importance or the essential character of the Orient Railroad, which is fully argued in our original brief and the brief for the Orient. The appellees do not dispute that there is evidence in the record tending to show the essential character of this railroad, and certainly it can not be disputed that this is a matter for the Commission's judgment. What counsel attempt to do is simply to point out scattered and fragmentary statements and draw from them a conclusion contrary to the conclusion reached by the Commission upon the whole record.

Page 6:

It is said that

As it costs the Orient \$1.1163 to earn a dollar, its case is hopeless so far as relief from revenue from its ~~connections~~ ^{income} is concerned. No matter what ~~is~~ income, it would be a loser under such operation. * * * A dollar costing \$1.1163 is a damage. In such circumstances the Orient must either cease operating or it must take some steps to bring its costs within its income.

The thought seems to be that the ratio of expense to revenue would not be changed by changing one factor, namely, the revenue, while the other factor, namely, the expense, remained constant. It is said that the Orient must cease operating or take steps to bring its costs within its income. Obviously there is another remedy, it may bring its income up to its costs.

Pages 19 and 20:

Appellees say that the financial condition of the Orient and its connections cannot be taken into consideration in fixing divisions unless the connections are earning more than a return of $5\frac{1}{2}$ to 6 per cent. In other parts of the brief this thought is reiterated. A conclusive answer is furnished by the *New England Divisions Case*, 261 U. S. 184. The court pointed out that financial needs were properly considered in that case in raising the divisions of the New England lines and reducing the divisions of the lines west of the Hudson. Not only were many individual lines whose divisions were reduced in that case earning less than 6 per cent, there was evidence to show that ~~the~~ 29 carriers in the eastern group, excluding New England, taken together, would earn only 4.55 per cent and that 15 of these carriers would earn less than 3 per cent. See the record in that case, pages 670, 671.

Here it is admitted that all of the Orient's connections affected by the Commission's order are earning larger returns than the Orient. Furthermore, here there was no showing that the western carriers, taken as a whole, were earning less than a fair return.

Pages 22 and 23:

An attempt is made to distinguish the *New England Divisions Case* on the ground that there the record contained information concerning specific divisions.

As fully explained in the original brief for the Commission, pages 40-43, in this case there is evi-

dence which served the same purpose and served it better.

Pages 23 and 24:

Another effort is made to distinguish the *New England Divisions Case* by showing that in that case the Commission refused to fix divisions of the Bangor & Aroostook and refused to fix the divisions on certain commodities because there was no evidence in respect of such divisions. Of course, the Commission can not fix divisions without evidence, and it properly restricted itself in the *New England Divisions Case* within the field covered by the evidence. In this case the evidence extends over all of the interchanged traffic between the Orient and each of its connections.

Page 29:

It is said,

Why did not the Commission go into this subject and find out what were the needs of the carriers in the western group and provide a level of rates which would have taken care of them all and given them a margin over for the help of the Orient? That is the course which it took in the *New England Divisions Case*.

The Commission took no different course in the *New England Divisions case* in this respect from the course which it followed in this case. In each instance the Commission had fixed a level of rates designed to yield a fair return to the carriers as a whole. If the suggestion of counsel means that in connection with its consideration of the Orient's divisions, the

Commission should have opened up a general rate case without request from any railroad, in order to redetermine and refix the level of rates for the western group, it needs no answer.

Page 37:

In criticising the Commission's use of "equated ton-mile" figures, counsel say: "A freight ton-mile expresses horsepower spent or the labor done" and "A passenger-mile means distance traveled without any relation to the cost or labor of compassing the distance." They then say: "You can not add weight carried to distance traveled and thereby produce any sound measure of what the Commission called "all revenues and all expenses."

We do not know what counsel have in mind, but the fact is plain enough. Both a "passenger-mile" and a "freight ton-mile" are units of transportation. In one case the unit is the transportation of one ton of freight for a distance of one mile; and in the other case, the unit is the transportation of one passenger for a distance of one mile. Neither one expresses horsepower spent or labor done or distance traveled.

Page 40:

It is emphasized that the Orient received \$0.0147 per ton-mile for services performed on interchange business, and its connections, taken together, received \$0.012 per ton-mile. From this it is argued that the Orient is receiving its just share, or more than its just share, of the rate as compared with its connections. But the figures tend strongly to support a conclusion directly opposed to that suggested when the character

of the Orient, its light traffic density, its small per train revenues, etc., are considered, together with other facts tending to show its relatively high operating costs. (See page 43 *et seq.* of the Commission's brief.) It then becomes apparent that the Orient's per ton-mile revenue, as compared with the ton-mile revenue of its connections on interchange business, is not high enough. In this connection, it is important to observe that while the average ton-mile revenue of the Orient was 1.47 cents on its interchange business, its operating expense per equated ton-mile on all business was 1.99 cents, or considerably higher. The showing as to appellees, taken together, is different. Their average ton-mile revenue, on business interchanged with the Orient, was 1.185 cents, while their operating expense per equated ton-mile on all business was only 1.14 cents.

Furthermore, the question of whether the per ton-mile revenue of the Orient on interchange business as compared with the per ton-mile revenue of its connections was high enough in view of the circumstances and conditions, was manifestly an administrative question to be decided by the Commission.

Pages 41, 42, 43:

An attempt is made to claim confiscation. The contentions urged have been answered already, but we wish to call attention to the statement beginning at the bottom of page 42:

Since on the Commission's own data and its own peculiar method of calculation the record discloses that eleven of the thirteen

appellees would fail to receive operating expenses out of the divisions, * * *.

There is nothing in the record which shows that eleven of the appellants or one of appellants will receive less than operating expenses out of the divisions. What counsel means is that in some cases the appellants will receive a per ton-mile revenue out of the divisions which is less than the average per ton-mile operating expense on all system business, freight and passenger. Such figures, of course, do not show, for the purpose of establishing confiscation, what the operating expenses are on the freight business which appellants interchange with the Orient. Strangely enough, the very figures which are here relied upon to show confiscation are discredited by counsel on pages 35 and 36 of their brief. The significance of these figures is discussed in the Commission's original brief on pages 59 and 60.

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FEBRUARY, 1924.